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Case and Comment

The Lawyers' Magazine—Established 1894

IN THIS ISSUE

The Only Substitute for the Science of War <i>Ohio State Bar Association Report</i>	3
And Repent at Leisure - <i>Harvard Law Review</i>	8
The Jealous Mistress <i>Connecticut Bar Bulletin and Dicta</i>	13
The Vindication of Joe Hinkle <i>South Dakota Bar Journal</i>	16
A Wildcatter's Paradise <i>Mississippi Law Journal</i>	21
American Treaties and Religious Liberty <i>Liberty</i>	26
Among the New Decisions <i>American Law Reports</i>	31
Legal Education in Europe <i>Russell Sage Foundation</i>	46
Screws v. United States <i>Cornell Law Quarterly</i>	48
Meet the Gang - - <i>Journal of Criminal Law and Criminology</i>	56
Re-employment Rights of Veterans in Private Industry - - <i>American Law of Veterans</i>	61



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—(January, nineteen hundred seven)

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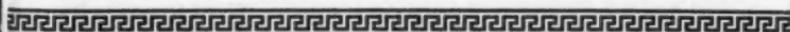
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Case and Comment

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The Only Substitute for the Science of War*

By Hon. ROBERT N. WILKIN

*U. S. District Judge,
Cleveland, Ohio*

Condensed from Ohio State Bar Association Report
(December 3, 1945, Vol. 18, No. 34)

SCIENCE reveals that life began in a single cell and that all development thereafter was a process of unification and co-ordination of cells. That process is repeated in each individual organism. Geologists and biologists point out that each successive upward step in the march of life has been a new advance in organization. A single cell, a group of cells, a lowly creeping worm, a mammal, man—we see in it all a growth in number, in complexity, and in co-ordination of parts in a whole.

From man, the most complex creature, that development next moved to new complexities, groups of men. Man's social growth progressed from family to clan, from clan to feudal state, from state to nation and federal union. Now with modern facility of transportation and communication our growth

has brought us face to face with the stark necessity of organization for the control of global activities.

Man's scientific contrivances, however, have exceeded his civil accomplishment. They act on a global base, he lives in a provincial state. His inventions are therefore without adequate social control, and the wonderful development that sprang from the nucleus is now threatened by nuclear energy.

Unless international anarchy is subjected to juridical order, force will prevail over reason and evolution will give way to revolution. There is no power in science and no balance of power among nations that can secure us against the atomic bomb. The only power that can save man now must be found in his rational and moral nature. And if that is to become effective it must express itself in a Constitution for the world.

The whole course of past

* Address before Judicial Section Meeting, November 29, 1945, at Cleveland.

events indicates that again the parts will be coordinated within a larger whole. Man's legal evolution begets the hope that now nations will be made subject to universal law. National pride and racial prejudice can not long prevail against the cosmic forces now at hand. The destiny of mankind will be fulfilled.

But here is the nub of the matter; if men in the exercise of their reason and conscience will now freely accept that destiny and will give to its fulfillment their active and ardent support, they may yet escape the unutterable horror of being bombed into it.

But if men fail now to establish juridical order for the world, another war, catastrophic in its destructiveness, may be predicted as confidently as the war just ended was predicted by President Wilson in his St. Louis speech at the end of the first World War. He said: "There will come some time, in the vengeful providence of God, another struggle in which not a few hundred thousand fine men from America will have to die but as many millions as are necessary to accomplish the final freedom of the peoples of the world."

What are the chances of fore-stalling a third world war? It can be asserted quite firmly that there is no chance at all unless we are willing to analyze the facts of modern life and accept

the conditions that confront us. We must determine definitely what our goal is, what the obstacles are to its attainment, and what must be done to overcome them.

First, we must accept the fact that the United Nations Charter is utterly insufficient for the world's present need. It was an advance over the Covenant of the League of Nations and an improvement on the Dumbarton Oaks Proposals, and we may rejoice that the United States Senate has ratified it. But still we must acknowledge that the Charter is only another balance of power, based not on universal law but on "the sovereign equality of all its members." The failure of all such efforts in the past cannot be denied. (See the *Anatomy of Peace*, by Emery Reves.) Furthermore a controlling position in the United Nations Organization is assumed by the five great powers and the sanction of their position is force. Before the United Nations Organization can take effective action for the enforcement of peace there must be agreement among the five great powers and at least two others. If that agreement is wanting, the United Nations are impotent. Atomic bombs and rocket planes have demonstrated the total inadequacy of such an arrangement for the world today. Upon this there is complete agreement by scientists, jurists, and columnists.

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Since the United Nations Charter is inadequate, what now must be our objective? What is the goal that will insure juridical order for the world? The answer is Constitutionalism. Man's whole legal and political evolution come to fruition in that theory, and Constitutionalism is now the only hope for the world.

The evolution of Constitutionalism is one of the most interesting and inspiring chapters of human history. (See *Constitutionalism, Ancient and Modern*, by C. H. McIlwain, Professor of the Science of Government in Harvard University.) To discover its beginning one must dig down to the deepest roots of our social growth. But as a definite legal and political force it had its origin in Republican Rome. In Israel it was a religious concept, giving voice to moral law. In Greece it was a philosophical concept, merely normative, not coercive. In Rome it became a jural concept, the basis of what the Romans referred to as *jurisdictio* as distinguished from *gubernaculum*; in other words, the reason of the law as opposed to the power of government. But in Rome its influence was restricted to private law. It was never effective in public law, and finally it became submerged in the *imperium* of the Emperor. When the Justinian Code was published the will of the Prince had the force of law.

In England, however, Constitutionalism transcended the

royal prerogative. After several hundred years of bitter struggle between regal and legal forces the common law prevailed over the prerogative of the Crown. In this country the evolution of Constitutionalism reached its highest accomplishment. It became the basis of our government at the time of its inception—the written charter of a federal union of sovereign states. After the success of that accomplishment any mind that can imagine a straight line extended should have no trouble in envisaging Constitutionalism for the world. Its outposts are already in all parts of the globe.

Now let us consider briefly the two principal obstacles to such extension of Constitutionalism. First, the most dangerous obstacle is the fear and suspicion which exist between the Union of Soviet Socialist Republics and the United States of America. Unless these giants of political power can be brought into agreement the prospects for peace remain dim. Their divergent economic theories are generally thought to be the source of trouble, but really they should occasion no serious difficulty. The extreme theories and practices of the Russian revolutionaries have been greatly modified in recent years. Russia today recognizes the right of private property and permits compensation to be graduated according to merit and ability. On the other

hand, the United States has been subjecting the selfish individualism of private enterprise to social control. The trend in both countries has been toward a middle ground between the extremes of capitalism and communism. Furthermore there is ample room within Constitutionalism for different economic experiments. There is no reason for nations to clash over conflicting economic theories. Each should be permitted to work out its own aims; each should be willing to accept from the other what proves to be best. We should give prompt and complete assurance to Russia that we have no designs against her present collectivist practices.

The most foreboding differences between the two countries arise in the field of legal and political theories and practices. Soviet Russia still adheres to a one-party regime and, according to current reports from respectable sources, still indulges in party despotism. It has not displayed a willingness to entrust to impartial tribunals the settlement of legal disputes nor to settle political differences by free elections. While it has relaxed its inhibitions against religion, it has not encouraged freedom of inquiry and freedom of expression. It still inclines to the oriental notion of government but cloaks its ancient adherence to force in the modern term of *realism*.

Now here is a difference that

is fundamental. We of America, English-speaking people generally, have participated in two world wars to prevent such a conception of government from gaining ascendancy in the world. We fought to maintain our right to live according to our conception of law—and if need be we will fight again. Men who have experienced the blessings of Constitutionalism value it above life itself, as millions of soldiers have proved.

Now as to this fact there can be no compromise and there should be no mincing of words. Our position should be made crystal clear to the Soviet leaders. If they mean to challenge us on this score, let us know it now, while we are in fighting trim.

A frank statement now, however, may serve to relieve the difficulty. Recent publications (see for instance, "Russia and the Peace," by Sir Bernard Pares) create a confident hope that if our position could be brought home to the Russian people they would see that there is no occasion for war between our nations. The American people and the Russian people have much in common. It is time now for the Anglo-American, the Slavic, and all other peoples to forget ancient abuses and cooperate for future benefits. The law which we champion is not national or racial, but universal. It represents man's highest social achievement. Its basis is

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reason; its object is the commonweal; its ideal is justice. Under its influence the whole human family could move into the enjoyment of Nature's bounty and man's scientific accomplishment.

The second great obstacle to world order is found in the inertia of democracy itself. People for many years have struggled to throw off restraints and controls. They wished to direct their own course and control their own destiny. Now they must do so. But at this critical period the responsibility seems too heavy a burden. Although the great leaders who have championed world order, like Wilson and Willkie in this country, Briand in France, and Churchill in England, have been rejected, we now hear the cry for leadership. The people, like a great herd, mill on the brink of disaster, and the popular vortex has progressed to the point where leaders cannot direct its course. Men in high office can only keep their ears to the ground and adjust their policies to popular movements. If there is no general urge there will be no advance. The people cannot be driven to the

uplands of Constitutionalism. They must go on their own motion or abide their fate.

If the next great step in social evolution is to be taken before disaster overtakes us, if we are to fulfill our destiny without being bombed into it, there must now be a popular awakening, a spiritual revival, a political ground swell. If such a popular movement is to materialize, it will require the impetus and direction of men trained in political and legal thought. It will require an organized group of such men, a group whose members are in contact with all classes of people, a group motivated by the professional spirit, that spirit which puts service above self. The legal profession could supply such need. Mr. Justice Roberts has marked the trail. (See the Resolutions of the Dublin Conference.) Will lawyers take it up? Or are they submerged too deep in the slough of selfish indifference?

The day is at hand. The clock of destiny tolls the fateful hour. Where will we base our faith—in juridical order or in the atomic bomb?

"Pursuant to our telephone conversation, we have prepared and herewith enclose a lease to be executed by the Brogdex Company and Mrs. McDowell.

"If the enclosure meets with the approval of the officials of your company, please be good enough to have them *executed*, the same in duplicate, and forward to us for execution by Mrs. McDowell."

Contributors, Moore, Romley & Roca, Phoenix, Ariz.

And Repent at Leisure

■ An Inquiry into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder.

By THOMAS REED POWELL
*Story Professor of Law,
Harvard Law School*

Condensed from *Harvard Law Review*,
September, 1945

If every decree of divorce granted by a court of one state is open to question and disregard in the courts of a second state, the resulting uncertainties are certain to be socially undesirable. If every decree of divorce granted by a state court must be accepted blindly by the courts of every other state, the resulting certainties may have many unfortunate repercussions. No one in any judicial position has clearly suggested that either extreme is desirable. Only an extreme libertarian would contend that divorces granted by mail or telephone to a petitioner who is a complete stranger to the severing jurisdiction should enjoy coerced recognition anywhere. Only an extreme doctrinaire or ritualist would contend that every decree of divorce should be open to re-examination of the evidence and disregard of the disjunction by any and every court in any and every proceeding

in which the marital status of a litigant or of somebody else might be material.

These semi- or pseudo-jurisprudential remarks are introductory to a consideration of the settled and unsettled issues incident to the two Supreme Court decisions of *Williams v. North Carolina* and *Williams v. North Carolina* involving successively an unsuccessful and a successful effort of North Carolina to punish two of her citizens who simultaneously left their respective spouses with whom they had long lived in North Carolina, went to Nevada where, after separate divorces, they immediately participated as parties in a marriage ceremony before re-

turning shortly to North Carolina where they dwelt together in purported conjugality near their former separate homes. In the first decision the Supreme Court held that the fact that the Nevada divorce decrees were granted without



personal service on the nonresident libellees did not entitle North Carolina to treat them as void. The second case held that under the circumstances disclosed by the evidence, North Carolina might inquire into the question whether the relationships of the libellants to Nevada were such as to confer on her courts a divorce jurisdiction that North Carolina must recognize, and that the North Carolina determination in the negative had sufficient warrant to stand against objection founded on the full faith and credit clause of the Constitution.

Except for decrees granted to nonresidents by mail or telephone or on personal petition presented between trains, it would be hard to conceive of a stronger case for raising the issue whether what may derisively be called over-the-counter divorces by a distant state should stand against the objection of another state to which all the persons involved would in the layman's sense be regarded as really belonging, notwithstanding a brief absent interlude on advice of counsel. A small-town storekeeper deserts his wife to elope with the absconding spouse of his clerk and soon returns to the neighboring county with his companion superficially sanctified as his substitute wife. Without knowing what took place before the departure from the long familiar places or what was the awareness or concern of

the neighbors, without venturing to assess the human and psychological justifications for the eagerness to be speedily off with the old bonds and on with the new, and with no basis for comparing the anguish and the satisfactions incident to the severing and the joining, one may nevertheless hardly refrain from imagining what disturbance would beset the life of small communities if such conduct became too flagrant and too common. The community in which one chooses to live and hopes to derive one's living may rightly have something to say about attempted evasions of its social standards and about escapes from its particular condemnations by briefly basking in the more clement legal climate of a sister state.

No such considerations as these are adumbrated in the full faith and credit clause, nor are they in any way specified in the due process clause of the Fourteenth Amendment.

Full recognition of this may go far toward discounting a point reiterated by Mr. Justice Black and by Mr. Justice Rutledge in their dissenting opinions in the second *Williams* case. This is that the majority do not assert that the Nevada decree of divorce "is not valid in Nevada" "or under Nevada law." A little reflection should make clear why they may have refrained from explicitly doing so. The issue before them for prac-

tical determination was not what Nevada might do but what North Carolina must or may do about what Nevada had done. In view of North Carolina's special concern in the matter, such an issue may be thought even narrower than whether Nevada had "jurisdiction so as to give extraterritorial validity to the divorce decrees. . . ."

This is not to deny that from the standpoint of judicial administration there are advantages in having a single rather than a double standard. It is easier to have a flat rule than to make distinctions based on judgment. Yet, from the standpoint of partitioning power among the several states, there may well be wisdom in having a gap between what due process will not forbid and what full faith and credit will not require.

On one phase of the situation in Nevada, the concurring opinion of Mr. Justice Murphy makes a point that must cause skeptics to lift their eyebrows. This is a suggestion if not a charge that Nevada had been hoodwinked and that the requirement of her own law was not satisfied. True enough, Nevada's law in books reads that the jury must be satisfied that the plaintiff's requisite presence is "accompanied by the intent to make Nevada his home, and to remain here permanently, or at least for an indefinite time." In a contested case before a jury, this should be charged, and the

evidence will be reviewed on appeal, though perhaps with some tolerance toward fostering Nevada's profitable domestic industry. If, however, it should be assumed that the Nevada trial judge was deceived by Mrs. Hendrix's coached swearing to the rubric of a headnote in her uncontested libel, Judge Foley might well resent the slight to his intelligence even if it were designed as a tribute to his character. He was satisfied by a simple "Yes sir" in answer to the leading question of counsel: "And that residence was an indefinite permanent residence?" He was not disturbed by residence in a motor court for an indefinite permanence, though he wanted to be certain that six weeks of such permanence had elapsed before proceedings were started. Such is Nevada's law in action, whatever her law in books.

The situation of the former Nevada visitors invites further exploration. Mr. Williams would seem to be still subject to the terms of the North Carolina statute even after his first wife's death. He still has contracted with another person in another state a marriage which would be bigamous if contracted in North Carolina. Cohabitation with that person in North Carolina is forbidden by the North Carolina statute. There is no exception in the case of later freedom to contract a valid North Carolina marriage. Renewed cohabita-

tion is a renewed offense, not immune from punishment because of *ex post facto* considerations. Otherwise a round of jail duty would blot out the past and leave North Carolina hindered in discouraging by this statute what she wishes to prevent. If the decision were to the contrary, the cohabitation is still punishable under an appropriately drawn statute unless the couple are validly married to each other. As soon as Mr. Williams becomes a genuine widower by the death of the mother of his four children and by the North Carolina valid assumption of the North Carolina futility of his Nevada ceremony, he would be free upon his release from jail to marry any one other than his Nevada-made consort. Co-habitation with her in North Carolina is forever foreclosed by the terms of the state statute, though it may well be supposed that North Carolina, if later events should make each of the two people indubitably single, would recognize the validity of a new marriage between them and at least refrain from prosecuting them under any notion of eternal damnation.

Turning to the particularities of the particular couple, their sudden and surreptitious departure indicates a full awareness that North Carolina was not hospitable to their immediate desires and that they had to find a way to evade North Carolina's

aversion. No lawyer of any sense and knowledge could have advised them that their plan was any better than at best a precarious gamble. When they started, the *Haddock* case was a warning that even the acquisition of a conceded domicil of one spouse away from the matrimonial domicil would not make a divorce decree a protector of property interests in the state in which one was found to have unjustifiably broken home ties.

It seems certain that the decisions carry no threat to people who go to Nevada and stay there. It might not matter how long they lingered if their divorces were granted shortly after their arrival and if ultimately they returned to their original home state. Technically the issue is that of the intent at a time before the decree, and there might be testimony that the intent on arrival and for some time thereafter was to stay just long enough to get the divorce. This would give grounds for questioning domicil at that time even though it should be undisputed that domicil was later acquired. At this very moment people who have received recent divorces in Nevada may be staying on longer than they had planned before the second *Williams* case came down. They may be buying property, taking jobs, joining churches, and sending for familiar furniture and rugs and

silver. From a technical standpoint all this would be quite irrelevant if the divorce and fresh marriage had previously taken place as soon as the statute and the docket would permit. Nevertheless, from a practical standpoint, it is unlikely that in many cases there would be a sufficient basis for questioning an initial intent except for the well-nigh inescapable inference drawn from a speedy return.

It seems extremely unlikely that either Congress or a majority of the Supreme Court will be prevailed upon to make some definite period of residence both requisite and sufficient for the award of a divorce that must without further inquiry be given full faith and credit in all sister states. Whatever was done by the Supreme Court would of course be constitutional, at least for the moment. There would seem little if any doubt that

Congress might constitutionally lay down some definite basis for compulsory recognition.

This is not to say that the road to certainty needs the pavement of national action. Persons who wish a divorce that will protect them from jail if they remarry have only to get one where they are really at home. So those who wish the benefit of easier divorce laws must really live in states which have them. To be really safe, those who are newcomers should live on in those states after they have received their dispensation. The approach to the whole problem should be from the standpoints of federalism and of the relation of states to each other. From these standpoints, even the most eager advocates of easy divorce should find themselves constrained to agree here with the majority rather than with the minority.

She Was Swindled

It was agreed that certain shrubbery was to be removed or taken up by the vendor who, pursuant to the agreement, did so and then shortly afterward received the following letter written to the vendor:

"Mrs Blank

Dear Madam:

This is to inform you that you will here from my attorney in a few days in regard to a damage suit and trespassing and intering my propertry and removing curtain flowers. Also party was here to day and told me what you offered the place to them for \$550.00.

I am asking you to return the difference between what I paid and this sum without suit and Lawyers fees and court cost.

Respt. yours
Mr. Blank"

Contributor: Wm. L. Mitchell, Evansville, Ind.

THE JEALOUS MISTRESS

By M. EUGENE CULVER of the Connecticut Bar

Condensed from Connecticut Bar Bulletin and Dicta

IN the "Docket" of October, 1926, under the title, "The Law Is a Jealous Mistress," appeared the statement that a Colorado bar association had issued a publication called "The Jealous Mistress" and had asked for the origin of the phrase. The editor said he could not tell the author and, having nothing better to do, I started to hunt for it.

I found that in Case and Comment in November and December, 1925, there was an address given by the Hon. Homer Cummings before the Kentucky State Bar Association, July 1, 1925, entitled "Contact with Life Through the Law." In this address Mr. Cummings said, "The law," as Blackstone long ago said, "is a jealous mistress." Another lawyer, addressing a bar association in St. Louis, said, "An obscure lawyer on a forgotten occasion said, 'The law is a jealous mistress.'"

I commenced to search and found that Sharswood, in a memoir of Sir William Blackstone, published in his edition of Blackstone's Commentaries in 1860, said: "It is not uncommon to hear the expression, 'The law is a jealous mistress.'" That seemed to dispose of the

idea that Blackstone himself originated the expression. I therefore looked in Coke and in Broome's Legal Maxims, but did not find it. I suddenly had what in modern language is called a "hunch" that I had seen the expression in Story's Miscellaneous Writings; and in a discourse pronounced by Joseph Story at his inauguration on August 15, 1829, as Dane Professor of Law in Harvard University, on the "Value and Importance of Legal Studies," I found these statements on page 523:

"I will not say with Lord Hale that the law will admit of no rival and nothing to go with it, but I will say that it is a jealous mistress and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage." As Justice Story is careful to give Lord Hale credit for what he quotes from him and follows it with his own statement, "I will say," I think it is fair to assume that he thought he originated it. And if he did, over one hundred years ago, was not the gentleman from St. Louis slightly in error in calling the author of the expression an obscure lawyer, and the incident of his being elected Dane Professor of Law

in Harvard University a forgotten occasion?

I should probably have let the matter drop but for the fact that Judge Haines, when I talked with him about it and told him I thought I had found the author of the expression, said to me: "I wish you would write my brother Charles, as he has been trying to find it." I wrote to Judge Charles Haines in Colorado Springs, and he replied that he had tried to find the author and had asked the Yale Law School about it. He felt that I had found the author.

The next I heard about it was in a letter from Chief Justice Maltbie on February 11, 1929, who said that Judge Haines had told him I could tell where the quotation "The Law Is a Jealous Mistress" came from. He said the Cornell University School of Law had asked the Connecticut State Library and that the Library had asked him.

I next heard from Hon. John H. Wigmore, who had been told I knew something about it. On March 25, 1929, he wrote me this letter:

"My friend Woodruff at Ithaca tells me that you can tell me the author and citation of the expression 'The Law Is a Jealous Mistress.'"

"I was first asked last year by the secretary of the Harvard Club of New York and since that time have received the query in many quarters but in vain."

I answered his letter and told

him what I had found and where I found it. He answered my letter and said he wished to have what I had written and that he would have it published in the Illinois Law Journal. In order that he might see what kind of publications we got out in Connecticut, I sent him a copy of the Connecticut Bar Journal in which there was an article I had written entitled "What Is Law?" He answered this letter and was good enough to say: "That was a timely article of yours, full of good doctrine. I wish it could be drummed into the people's minds." Chief Justice Maltbie wrote me on March 12, 1929, that he had turned my letter over to the Connecticut State Library and that they had made a copy of it and sent it to the Cornell School Library of Law and had also kept a copy on file for future reference.

As my friend the Honorable Homer Cummings had stated that Blackstone had said long ago that the law is a jealous mistress, I wrote him, stating why I thought Blackstone did not say it or originate it. He wrote me from Washington on July 24, 1933, and his reply justifies quotation:

"I notice with interest what you have to say about the famous phrase 'The law is a jealous mistress.' It is quite true that I used that phrase in one of my addresses a good many years ago and attributed it to Blackstone. Nobody seemed

to rise to challenge the statement until I received a letter from Judge Charles Haines of Colorado Springs, who maintained stoutly that Blackstone never said it. With some degree of confidence I maintained that Blackstone had said it on two theories: first, if he had not said it he ought to have said it, and second, no one can point out who had first said it and, therefore, I was determined to stick to Blackstone until someone could show I was wrong.

"Now you come along and point out that Chief Justice Story said it in 1829. Being of a tenacious disposition, at least at times, I still cling to the Blackstone theory. It does not seem to be conclusive that because Story said it Blackstone had not said it first. I think, however, I ought to pin a medal on you for your capacity for industrious research."

I also wrote to the lawyer who said that "an obscure lawyer on a forgotten occasion said 'the law is a jealous mistress,'" and asked him if he thought Mr. Justice Story was an obscure lawyer and if he thought the

inauguration of Mr. Justice Story as Dane Professor of Law in Harvard University on August 15, 1829, was a forgotten occasion. He replied simply that he did not know who made the statement.

Trusting that this history of my research and the letters of the distinguished gentlemen who were interested will be of interest to the bar, I submit it for approval.

In closing, I cannot forbear wondering why, if I am right in thinking the expression was first used by Mr. Justice Story in August, 1829, and has been constantly quoted, no one thought to hunt for the author of it before this time, but when the inquiry got started almost simultaneously in various parts of the United States sometime in 1925-6, the search by Bar libraries and others did not meet with success, and it is possible that, like Banquo's ghost, it will not stay down. It appears that I have started something. If I have, my hat is in the ring and I will be glad to search further if occasion demands.

Astute Cross Examination

A newly married lawyer was walking with his wife when a beautiful girl smiled at him. Wifey became suspicious and asked who the lady was.

"Oh, just a girl I met professionally," came the reply.

"No doubt," meowed his wife, "but whose profession, yours or hers?"



The Vindication of Joe Hinkle

By Hon. A. K. Gardner, Judge, Circuit Court
of Appeals -- Condensed from South
Dakota Bar Journal, October, 1945

IT was in the Fall of 1903 that old Joe Hinkle was arrested, charged with an assault with a dangerous weapon with intent to kill. That was some forty years ago. Olin McIntosh, a neighbor, was the complaining witness. Joe lived on a farm in the valley just east of Piedmont, in Meade County, South Dakota. He was an old settler, an old soldier, tall, large and muscular, approaching sixty years of age. He was a hale, hearty, boisterous man with a loud penetrating voice and a rollicking laugh. Olin McIntosh was twenty years younger than Joe, not quite so tall but about the same weight. He was broad shouldered, deep chested, thick necked, stockily built, with an elastic step and a determined face. Every inch of the man proclaimed his physical power.

When Joe was arrested, he rushed down to Rapid City to see his old friend Tom Sweeney, the widely known Rapid City merchant who advertised with the slogan, "Tom Sweeney Wants To See You." Tom knew and loved every fighting man in the Black Hills. He was sympathetic for he had had many physical encounters of his own.

Coming into my not too busy office, Tom said, "This is my old friend Joe Hinkle from Piedmont. He's a good fella but is in a little trouble and I want you to help him out."

After talking the matter over with them I expressed the view that we had better demand a preliminary hearing and have the testimony of the State taken by a reporter but not put in any evidence at the hearing, as the committing magistrate would doubtless bind Joe over and there might be some strategic advantage in not disclosing our own evidence. But Joe Hinkle was a fighting man and he insisted that the fight be pursued at every stage and opportunity. In fact, at this time Joe was a county commissioner for Meade county and he was restless to be vindicated at the earliest possible moment. Out of deference to his insistence I consented to carry the battle to the camp of the enemy.

On the date set for hearing I arrived in Sturgis by train. Joe met me at the depot. His witnesses, Tom Murran and Dick Bullock, arrived a little later. Joe was as restless as a caged lion. In his somewhat disjoint-

ed conversation he said to me, "Now young feller, you want to do your best." In an attempt to calm his nerves somewhat I said, "Joe, did you ever hear what Cromwell said to his soldiers just before battle?" He replied, "No, what was that?" I said, "Pray to the Lord, and keep your powder dry." Joe grunted audibly but did not seem to take much stock in Cromwell's admonition. He wanted action. Bailey Madison was the justice of the peace before whom the hearing was to be held. Incidentally, he too was an old soldier.

There were two witnesses for the State, Olin McIntosh and a woman whose name I have forgotten, who at the time of the fight was Joe's housekeeper. Olin testified first. His personal appearance was somewhat shocking. His face was swollen and badly bruised, displaying many shades of black and blue. As a physical exhibit he was far from handsome, and as a witness he was sullen, bitter and still angry. He testified that on the Sunday morning in question he discovered Joe Hinkle's bull in the act of breaking into his field. He saddled a horse and rode down to Joe's house to notify him that his bull was out and to come and get him; that when he arrived Joe was on the porch cleaning his shotgun. Olin had ridden up on a gallop and called to Joe telling him about his bull and demanding

that he get him at once and see to it that he took care of him. Joe made some insolent answer and after the exchange of a few hot words Olin slipped off his horse and went toward Joe. As he did so Joe swung at him with the gun barrels, which Olin grabbed in order to protect himself and a struggle ensued, during which each clung to the gun barrels, but Olin finally succeeded in wresting them from Joe, and with that Joe stepped into the door of the house, returning at once with a Colt pistol, which he brandished in his hand, striking Olin repeatedly in the face, as was further evidenced by the condition of his face. During the fray Olin hung onto the gun barrels but they were unwieldy at close distance and he retreated toward his horse. When the hostilities abated, Olin mounted his horse, still clinging to the gun barrels. Joe called to him to drop them, which he did not do, but started away on the gallop, and very shortly he heard a shot and a bullet struck in the ground a short distance ahead of him. On cross-examination he admitted that he had notified Joe about the bull and demanded that he come and get him before he got off his horse; that when he got off his horse he started toward Joe because of what Joe had said, or what he had called him. He insisted, however, that his struggle for the gun barrels was sim-

ply to prevent Joe from striking him with them.

Then came the woman witness, and she was both damaging and willing. She corroborated what Olin had said, but added that Joe, as he came out with his pistol, pointed it at Olin and snapped it twice but it failed to discharge, and that Joe then used it as a club with which to beat Olin on the face and head; that after Olin quit the fight and mounted his horse and headed toward home, Joe called to him, demanding that he drop the gun barrels. He then stepped into the house and returned with his rifle, which he pointed toward the receding Olin and as he did so said, "Now watch the S. O. B. curl up in his saddle." He shot the rifle but Olin neither stopped, nor dropped the gun barrels, nor "curled up in his saddle." On cross-examination she admitted that Joe had discharged her and that she was unfriendly, and finally I succeeded in getting her to admit that after the fight she had said to a certain other woman, whom I named, that she intended to get square with Joe Hinkle.

This was not a simple Black Hills gun fight. It was a battle of giants with three guns, each of which had at some time during the fray been in the hands of my client. It was difficult to determine whether Joe was charged with beating Olin up with the Colt pistol, attempting to shoot him with the rifle, or

mow him down with the gun barrels. Fortunately for Joe, there were present at his home that Sunday morning two friends who were preparing to go hunting for prairie chickens with Joe—Tom Murran, the storekeeper for the Homestake Mining Company, and Dick Bullock, employed as guard for the Homestake Mining Company. These men corroborated Joe's testimony to the effect that all three men were preparing to go out to hunt prairie chickens and Joe was cleaning his gun for that purpose when Olin quite unexpectedly rode up to the house; that he was apparently in a towering rage and began to hurl epithets at Joe and his bull, threatening the lives of both. Joe, not having heard that "A soft answer turneth away wrath," replied defiantly, and, like the Highland Chieftain Roderick Dhu, defied the intruder to do his worst. Olin slipped off his horse and started toward Joe who attempted to ward him off with the gun barrels, but Olin grabbed them and in the ensuing struggle wrested them from Joe who had been backed up to the very door of his house; that Joe reached in through the open door and from some source brought out a pistol, and the two men, Olin with the gun barrels and Joe with the pistol, renewed the struggle. They denied that Joe pointed the pistol or attempted to discharge it, but that he clubbed Olin in the

face with it, while Olin was attempting to strike Joe with the gun barrels. They admitted that when Olin started to leave and got on his horse, still holding the gun barrels, that Joe went into the house and returned with his rifle. They denied that Joe said as he discharged the rifle, "Now watch the S. O. B. curl up in his saddle." They testified that Joe was a crack rifle shot and in their opinion that if he had wished to shoot Olin he could easily have done so. Joe testified that he had no intention of shooting Olin when he discharged the rifle but that he had called to him to drop the gun barrels and shot ahead of him trying to halt him.

This in brief was the evidence on which I moved for dismissal. I do not recall the argument of the State's Attorney, except that he insisted that the evidence of the woman, and all the attending circumstances, proved conclusively that a crime had been committed by Joe Hinkle, and that the defense offered by his friends was far fetched and fantastic and at most raised issues which should be passed upon by a jury; that Joe had not been satisfied to quit the fight but deliberately went into the house, got his pistol and renewed it, and that even after Olin began his retreat on horseback, he again deliberately committed another crime by getting his rifle

and trying to shoot Olin with it.

It was up to me to convince Bailey Madison that not even a *prima facie* case had been made out and that his old comrade Joe Hinkle was entitled to be discharged and not put to the expense and humiliation of a trial in circuit court where under the law he would be entitled to an acquittal if there were a reasonable doubt of his guilt; that no Black Hills jury would ever convict him; that under the evidence Olin was within his rights when he went to Hinkle's to notify him about the bull, but having done so he should have returned home, but instead he had gotten off his horse, invaded the curtilage of Joe's home, and himself became the aggressor and brought on a fight in which he had not been successful and for that reason now, after acting the part of an outlaw himself, was invoking the protection of the law; that Joe had a right to defend himself and to use such force as was necessary to exclude the intruder from his home; that Olin, twenty years younger than Joe, pursued him to his very threshold, and even when compelled to retreat carried off with him the property of his neighbor; that Joe, in discharging the rifle, did not intend nor attempt to shoot Olin but only to stop him; that Joe had learned the use of the rifle while in the front lines of battle, fighting under the same flag as His Honor, and that in that

school he had learned how to shoot to kill, and if he had intended or desired to kill Olin McIntosh he would have done so.

The justice discharged Joe and in doing so observed that Olin had no business getting off his horse and going into Joe's front yard; that when he did that he was hunting for trouble—and got it; that Joe, when he fired the rifle, did not intend to

kill Olin or he would have done so, as he was a crack shot.

Thus justice prevailed and Joe Hinkle was vindicated. Thereafter Joe and Olin continued to live as neighbors and were good, peaceable, law-abiding citizens. The last time I saw Joe, he hailed me with the salutation, "Hi there, young feller! Pray to the Lord and keep your powder dry!"

Correct Error

This is a fact—it just happened recently and in a small town, too—a certain stenographer wrote a letter and should have written:

"I have an order that there is no net income tax due, etc."

Here is what she wrote:

"I have an order that there is no need for income tax due, etc."

She was right—there was no need of it.

Contributor: J. J. Eisenmenger, Milbank, S. Dak.

Locus in Quo

The case was one for divorce. The plaintiff husband had charged cruelty in general terms. We represented the defendant wife and moved for a bill of particulars which, as frequently happens in cases of this kind, we got with humiliating, not to say excruciating, details of the most intimate personal relationships between the parties to the case.

The Judge, a bachelor of rotund outline and florid complexion, called the case for trial. Then as the two parties and their respective counsel sat at opposite tables, the judge proceeded to read the pleadings. By the time he had finished, his face was a deep red.

"Gentlemen," he fumbled, "I believe we'll try this case in chambers. Apparently that is where the cause of action arose."—*Dicta*.

A Wildcatter's Paradise

BY JUDGE CAMILLE KELLEY

Extracted from 14 Mississippi Law Journal 553



I HAVE never failed to respect the law, but I will tell you where I think our greatest trouble with young delinquents expresses itself right now. I think we treat delinquents very carelessly even where we have adequate courts. Just day before yesterday I had a little meeting with an ex-convict. I tried this boy when he was just about to get over the line from my jurisdiction, which is, on the first offense, up to seventeen, and, if I gain jurisdiction before the child reaches seventeen, I can retain that jurisdiction to the age of twenty-one. This boy was brought to me for theft. I had only one opportunity to work with him. He was too old, the time was too short, and the association was too limited for me to unfold this boy and give him a new morale of thinking and a new atmosphere of living, but I did have an opportunity to gain his confidence and his affection. I sent him to the State Training School in Tennessee, a reform school, but I did not lose him there. I tried to "sort of" hold a friendship with him. He

was not a good boy; he was not a handsome boy. It is not hard to take a great, big, handsome, athletic boy and love him, but to take a deep interest in a scrawny, wildcat boy, is quite another thing. I wrote down the phrase—"a wildcatter's paradise"—which was used by the other speaker. That is where I have been for a number of years. I love the wildcatter, the tempestuous, turbulent boy, and I love even the unattractive boy. If you reform a little old tame, placid boy or girl you have to cart him around in a wheelbarrow the rest of his life, but if you take a wildcat, surging and pulling at the bits and make him want to get somewhere, teach him to enjoy doing something well, he can take the world in his stride. If they are good-looking and do something they shouldn't, you say, "Bless his heart, it is just the error of a child," and he gets by, but this little scrawny, unattractive boy was doomed. He came back from the reform school; he left the State of Tennessee, got in trouble with the law, and was put in the penitentiary. He was really sick, mentally and physically.

* An extract from an address of Judge Kelley of the Juvenile Court of Memphis, Tennessee.

I wish I had the time to tell you all the steps with that boy, but I haven't. I simply want to give you one little thought in dealing with the case. I gained his confidence and his affection. I had made no inroad at all upon his principles or morals. This would have taken much time. He was still dishonest; he would steal anything he could find. So an incident happened that I think will make you a part of this week's conversation with him. First, we will go back a bit. Every time he would come to Memphis between getting into penitentiaries, he would come to see me. He was very fond of me; he didn't know much about what I represented, but I was a friendly person and that was all he cared.

So one day this anemic looking little fellow came to see me and I was out. The door was open to my office; my secretary was in an adjoining office. He sat down in my private office; he saw on my desk a very charming and attractive electric clock made of cream colored enamel of some kind that one of my sons had given me. He quietly slipped to the desk, unfastened it, and put it under his coat and told the secretary he would be back and see the judge in a few minutes. As he went out, I drove into the yard. My chauffeur saw the boy with something under his coat. He was heading up the street, so the chauffeur followed him, without no-

tice, to see where he was going and what he had under his coat. The boy hid the clock in the trunk of an old rotten tree and started back to visit the Judge. My chauffeur got the clock and returned it to the Court. A great big Irish-American detective came in—I wish we had thirty minutes to talk about the psychology of policemen. They are the most interesting people in the world, and I think policemen are perfectly splendid. The only thing is that they are ashamed of being good instead of being ashamed of being bad, but if you just take that into consideration, you will appreciate them. They also prefer to walk like prize fighters. But those are just a few little undercurrents; and after you accustom yourself to them you don't let them interfere with the straight lines of a good officer's character. Anyway, that blond detective came in to see me, feeling his power with every step.

I didn't know the clock was gone. The detective saw the boy and said, "He's a con—he's a con" (meaning a convict). "I've been looking for him. I want to question him." That scrawny, ugly little boy looked at me and said, "Judge, help me."

"Wait a minute, son," I answered. "It is perfectly normal and right when a boy has violated the code and has a record and something happens, that the police should question him first. This is for the protection of so-

ciety. Go with him and if you haven't done anything wrong, he will bring you back to me."

He put the boy in the patrol wagon and about this time my chauffeur came with the clock. I was stunned. The detective looked at me and his eyes said, "Just like a woman, so sentimental, so full of love, and she thought that terrible convict was just a sweet little boy."

Aloud he said, "He even stole your clock and you think he is fond of you. Judge, if you prosecute him, we can give him five years in the penitentiary, and if you don't we can't give him but seventy-five days in the workhouse."

I answered, "If all the penitentiaries are like those I have seen, five years in the penitentiary will not make a man out of him, and if all the workhouses are as nice as the one in Shelby County, it might make him stop and think. And besides, I got my clock back, and unless the judge insists, I will not prosecute." They gave him seventy-five days in the workhouse.

About forty-five days later I had a phone call. It was from Batesville, Arkansas, and this boy was calling and he said, "Judge —" I realized it hadn't been seventy-five days, and said, "Son, it hasn't been seventy-five days, why aren't you in the workhouse?" He said, "I know it, Judge, but, Judge, I can't sleep, I can't live, I can't stand it. I ran away, Judge. I know

you are the law and you will turn me over to the workhouse, but I ran away anyway. I had to come, but I called you the first minute I could. It's about your clock, Judge." "Yes, my clock, Son, I have been here so many years and left my door open and not a single boy or girl has ever lifted a single thing off my desk or out of my office. Why did you take my clock?" The psychology of it puzzled me. He said, "But, Judge, you don't understand. I didn't know it was *your* clock; I thought it was the City's clock."

He got a job, but the minute they found out he had a record they fired him. You can't blame them. They didn't want a thief working for them, and they couldn't see inside of him. Not long ago, after he had stabilized himself completely, he got a job up in the country. A few days later they found the man working next to him with a pistol in his pocket. When asked what in the world he was doing working with a pistol, the man said, "I have found out that the man next to me is an ex-convict, so I am carrying a gun."

Now, jumping quickly to last week. I had written the story of the clock in a book just published. The other day a tap came at my door. This funny little old boy, his hands blistered from labor, came in, and he said, "Judge, I am going to Pearl Harbor. I have a chance to get there and rub out that old

record and get people to stop looking down on me. If I don't get there, perhaps I can get into a hospital for the criminally insane and work there where they will look up to me. I promise to be kind to those poor devils if the officials will give me a chance. I am so tired, and I have tried for four or five years, and there is not a solid particle of ground under my feet." He saw my book on the desk, his eyes brightened and he said: "Judge, did you put me in your book?" I said, "Yes, son, I surely did put you in my book." People just want to have themselves expressed whether it is good or bad. This boy had just as soon be the head of a gang as the leader of the group, but he must have the spotlight.

He said, "Did you really put me in your book?" "Yes, I put the clock story in the book." And he said, "Read it to me, Judge." While I was reading his own little story to him, the tears were dropping on the front of his shirt. The next day he went to the draft board. They looked into it carefully, but they couldn't take him. And you and I know they were right.

Just two days ago, I called the Warden at Brushy Mountain and asked, "Could you take care of a boy who can't live outside the walls? Will you give him a small pittance of money and a little place to put his feet on solid ground and a chance to serve somewhere in this world,

or else will you advise that we chloroform him? Take your choice." He said, "Judge, what is the matter with you?" You know men don't understand women when they get excited. Men are terrified. And really, it is a dangerous situation because not only is it true that men don't know what we are going to do, but we don't either. I said, "You know what I have wanted you to do in the penitentiaries and around the camps."

I am telling you this story, so that we may work out a solution to one of the greatest dangers that besets society. We ought to have a place where there is at least a meager salary paid to the men who have absolutely wrecked the garment of their citizenship, spoiled their characters in such a way that they are not permitted (even though very justly) to fit into your business or mine, or to handle your money or mine. You don't know when the memory—which is a very peculiar thing and runs always through the back of a person's thinking—will challenge personal behavior, and you don't know when the repetition of an old story will throw one off balance. I told the Warden: "This broken man is willing to work for \$30.00 a month and go inside of any wall and be searched every time he goes in and every time he goes out." He said he thought it was a grand idea, and he gave him

the job, but not inside of walls exactly. Perhaps he did it largely to keep me quiet—and it is hard to keep a woman quiet—but we rescued this man for himself and society.



How Well Do You Remember Case Names?

*W*HAT doctrines of the law do these celebrated cases suggest?

1. Scott v. Fletcher	6. Marbury v. Madison
2. Davies v. Mann	7. The Slaughterhouse Cases
3. Hadley v. Baxendale	8. Dartmouth College Case
4. Smith v. Marrable	9. McCulloch v. Maryland
5. Lawrence v. Fox	10. The Williams Cases

Answers on page 30.

Lumpkin, J., on Inconsistent Remedies

Where one is in a situation in which he may elect between two inconsistent proceedings, the choice of the position which he will take must be made before bringing suit, or in doing so. If he may change his mind once after having assumed and thus declared his position and based his suit upon it, why may he not do so again? And where is the limitation upon decision and re-decision, selection and re-selection, and vacillation between inconsistent positions and remedies, as it may appear to the litigant from time to time that his chances are better in one direction or the other? Can he be allowed to swim hither and thither in a sea of legal uncertainty until he has been transfixed by the harpoon of a final judgment?

Board of Education v. Day, 128 Ga 156, 57 SE 359

American Treaties and Religious Liberty

By FRED L. CRAWFORD
Member of Congress from Michigan

Condensed from *Liberty*, Fourth Quarter, 1945

THE doctrine of religious freedom has at last encircled the world.

After a century and a half of successful existence in the United States, the great doctrine is now being given global significance by the United Nations. Freedom-loving Americans hope and pray that religious freedom will mean more to the people of the world than mere words in a signed and sealed document. They hope it will become a breathing reality.

Global encirclement by religious freedom has been emphasized in three great international documents within the past few weeks as the most hideous war in history was feebly gasping its last few breaths. It is not an innovation for the United States to be a signatory to an international agreement containing provisions for religious liberty, for the first mention of this typically American doctrine appeared in a treaty

made by the Continental Congress before the birth of the United States. Since that time this country has entered into more than fifty treaties, each with a part which embraced religious freedom.

From Jefferson, Madison, Patrick Henry, and many more "fathers" of American freedom, to President Harry S. Truman is a long step; but the spirit of unfettered religion is as much alive in the three great international agreements associated with the ending of the war as it was in Madison's Memorial, or in Patrick Henry's famous speech.

One of the most important of these documents is the Charter of the United Nations which was drafted and adopted by the delegates to the recent San Francisco Conference. It is now pending ratification by the signatories, the United States Senate, by its sanction, making this nation the first to



ratify. Of the other two, one is the Potsdam surrender ultimatum to Japan, to which that nation reluctantly assented, and the other is the tripartite agreement at the Berlin Conference.

The United Nations Charter deals with several phases of religious freedom. Section 3 of the Charter's Article I states that the purpose of the United Nations shall be "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms of all without distinction as to race, sex, language, or religion."

Nations of the world that through calamities of the war are not yet self-governing, are guaranteed freedom of religion through a protectorate of the United Nations. The Charter establishes an international trusteeship, whose duty it shall be to "encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."—Article 76. Human rights and fundamental freedoms are to be made subject of a continuing study by the United Nations Economic and Social Council, provided for in the Charter, and this council is directed to make recommendations "for the purpose of promoting respect for, and observance of, human rights and fun-

damental freedoms for all."—Article 62, section 2.

The tripartite conference of Berlin, participated in by President Harry S. Truman for the United States, Prime Ministers C. R. Attlee and Winston Churchill for the United Kingdom, and Generalissimo Joseph V. Stalin for the Soviet Union, resulted in an agreement on future plans for defeated Germany which contained provisions for freedom of religion.

One part of this agreement was that "all Nazi laws which provided the basis of the Hitler regime or established discrimination on grounds of race, creed, or political opinion shall be abolished." This wipes out the ugly laws against the churches. The accord further provides that "subject to the necessity for maintaining military security, freedom of speech, press, and religion shall be permitted, and religious institutions shall be respected."

The Potsdam ultimatum to Japan, announced July 26, giving Japan terms of unconditional surrender, echoed words of religious freedom similar to ones in another document signed by the United States and Japan nearly a century ago. The Potsdam edict declared, as one of the provisions for surrender, that "freedom of speech and religion and of thought, as well as respect for the fundamental human rights shall be established" in Japan.

Japan was given in 1858 its first lesson on the principles of religious liberty as practiced in America, and its textbook was in the form of the Treaty of Commerce and Navigation entered into between the two nations in that year. This agreement contained a clause stating, "Americans in Japan shall be allowed the free exercise of their religion, and for this purpose shall have the right to erect suitable places of worship. No injury shall be done to such buildings, nor any insult be offered to the religious worship of Americans. American citizens shall not injure any Japanese temple or mia, or offer any insult or injury to Japanese religious ceremonies, or to the objects of their worship. The Americans and Japanese shall not do anything that may be calculated to excite religious animosity." An unusual sentence inserted in this treaty said, "The government of Japan has already abolished the practice of trampling on religious emblems." Another treaty was signed in 1894 by representatives of the two nations, and it contained a clause which read, "The citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and, subject to the laws, ordinances, and regulations, shall enjoy the right of private or public exercise of their worship."

China was a party to the Potsdam ultimatum to Japan, but she, too, established the first semblance of religious freedom within her borders largely as the result of a treaty with the United States. That treaty was concluded fourteen years earlier than the one with Japan, and said on this subject: "Citizens of the United States residing or sojourning at any of the ports open to foreign commerce shall enjoy all proper accommodation in obtaining houses and places of business, or in hiring sites from inhabitants on which to construct houses and places of business, and also hospitals, churches, and cemeteries."

Religious freedom as a part of China's "open door" policy was incorporated in the treaty with the United States in 1858. The earlier treaty was rewritten and the following article was added: "The principles of the Christian religion as professed by the Protestant and Roman Catholic churches, are recognized as teaching men to do good, and to do to others as they would have others do to them. Hereafter, those who quietly profess and teach these doctrines shall not be harassed or persecuted on account of their faith. Any person, whether citizen of the United States or Chinese convert, who according to these tenets peaceably teach and practice the principles of Christianity, shall in no case be interfered with or molested."

This paragraph differed from earlier treaties in that it spoke for religious liberty for the nationals of the country with which the United States negotiated the document. In 1868 we ratified another treaty with China, restating the principles of the above paragraph, but adding that "it is further agreed that citizens of the United States in China of every religious persuasion, and the Chinese subjects in the United States, shall enjoy entire liberty of conscience, and shall be exempt from all disability or persecution on account of their religious faith or worship in either country." This obviously broadened the freedom to include those not classified as "Christians," or identified as "Protestants," or "Roman Catholics," as the previous treaty had stated.

Perhaps the oldest treaty of record involving the Western Hemisphere which had a religious freedom clause is the one approved by the Continental Congress on January 22, 1783, with Netherlands. It was entitled a "Treaty of Amity and Commerce." Early among its clauses was one which stated, "There shall be an entire and perfect liberty of conscience allowed to the subjects and inhabitants of each party, and to their families; and no one shall be molested in regard to his worship, provided he submits, as to the public demonstration of it, to the laws of the country."

The doctrine was a part of one of the first treaties entered into following the union of the States. On May 17, 1786, a treaty with Prussia was ratified, which, among other things, provided that "the most perfect freedom of conscience and of worship is granted to the citizens or subjects of either party within the jurisdiction of the other, without being liable to molestation in that respect for any cause other than an insult on the religion of others."

Those responsible for incorporating religious freedom in this nation's Constitution when the nation was founded were also careful in the country's infancy to make sure that its emissaries traveling in foreign lands should be ensured of the unfettered



privilege of worshiping in whatever manner they had been accustomed in America. Clauses similar to that quoted from the treaty with Prussia appeared in practically all the early treaties.

An all-embracing type of treaty such as the 1868 revision of the treaty with China to include Christian and non-Christian may be found in the nation's archives and antedates the China treaty by many decades. It is the treaty with Tripoli, ratified in 1796. It declared that "as the Government of the United States of America is not in any sense founded on the Christian religion," and that since we held no enmity against

the religions of the Mussulmen, and since we were not hostile "against any Mehomitan nation," therefore it was declared "that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries."

At least thirty-eight nations have joined this nation since its formation in general treaties which have included clauses with respect to freedom of religion. That this clause proved entirely satisfactory is shown by the fact that it was generally repeated in subsequent treaties with the same nation.



Answers to "How Well Do You Remember Case Names?" Quiz

1. Proximate cause
2. Last clear chance
3. Rule of consequential damages
4. Implied condition of reasonable fitness for habitation
5. Privity of contract
6. Right to declare an Act of Congress unconstitutional
7. The police power of the state in protection of health
8. Impairment of contract obligations
9. State taxation of Federal instrumentality
10. Divorce on constructive service—matrimonial domicile

Grades

9-10 Excellent; 7-8 Good; 5-6 Fair

Among the New Decisions

Automobile Insurance — "comprehensive clause." The New York Court of Appeals in an opinion by Judge Dye held in *Tonkin v. California Insurance Co.*, 294 NY 326, 160 ALR 944, 62 NE2d 215, that damage to an automobile from collision with another vehicle, which had been halted by a traffic light, when, a fire having started in the automobile, smoke coming out from under the dashboard caused the driver to lose control, is within the coverage, described by a policy as "comprehensive," of insurance against loss or damage to the automobile "except by collision, but including fire."

The annotation in 160 ALR 947 discusses "Coverage of policy insuring automobile against particular risk, to the exclusion of others, where risk insured operates to subject it to risk not insured."

Bail — *delinquent child proceeding*. Justice Simpson in the case of *Espinosa v. Price* (Tex) 160 ALR 284, 188 SW2d 576, held that the civil nature of proceedings against delinquent children excludes the application of constitutional and statutory provisions as to bail in criminal cases.

The annotation in 160 ALR 287 discusses "Constitutional or statutory provisions regarding release on bail as applicable to children subject to Juvenile Delinquency Act."

Constitutional Law — *validity of statute requiring incorporation of labor unions*. The Colorado Supreme Court in *American Federation of Labor v. Reilly* (Colo) 160 ALR 873, 155 P2d 145, opinion by Judge Knous held that the provisions in the Colorado Labor Peace Act which require collective bargaining units, local labor unions, and company unions to incorporate, and also prohibit, under penalties, such organizations from enjoying the privileges recognized by the act and covering the entire field of labor relations, unless incorporated, are invalid as violating the constitutional guarantees of free assembly and free speech.

The annotation in 160 ALR 890 discusses "Constitutionality of statute which requires incorporation of, or otherwise specifically regulates, labor union or collective bargaining unit."

Contracts — *public employees' agreement to accept less than compensation fixed by law*. A

question on which there is a sharp division of authority was decided in the case of *Allen v. City of Lawrence* (Mass) 160 ALR 486, 61 NE2d 133. Judge Spalding prepared the opinion holding that where the compensation of a public officer or employee has been established by law, a contract by which he agrees to accept a less amount is invalid as contrary to public policy, and the doctrine of estoppel and waiver may not be invoked to give it effect.

Supplementing earlier annotation in the series, the more recent cases are discussed in the annotation in 160 ALR 490.

Covenants and Conditions — restraints on alienation. Commissioner Stanley wrote a very interesting opinion in *Gray v. Gray*, 300 Ky 237, 160 ALR 633, 183 SW2d 439, holding that the restraints on the power of alienation of the defeasible fee in remainder, imposed by a provision of a will by which testator devised property to his seven nephews and nieces jointly for life, the descendants of any dying to take the parent's interest, which, in case of death without leaving descendants, is to vest in living survivors, and directed that upon the death of the last survivor of the nephews and nieces their descendants shall take the fee, and further provided that any one of them may sell or lease his interest in the property to any of his cotenants but

to no other person, are unreasonable both in respect of time and of grantees.

The annotation in 160 ALR 639 discusses the permissible limits of restraint on alienation as applied to life estates.

Criminal Law — limitation in prosecution of accessory. In *State v. Patriarca*, (RI) 160 ALR 387, 43A2d 54, Justice Condon wrote the opinion holding that where a felony and being accessory before the fact to the felony are regarded as distinct offenses, a statute excepting murder from a limitation of the time for instituting criminal prosecutions cannot be regarded as also excepting a prosecution on the charge of being accessory before the fact to the crime of murder, even though another statute provides that an accessory before the fact to a felony shall suffer the like punishment as the principal offender.

The annotation in 160 ALR 395 discusses "Accessories to crimes enumerated in statute of limitations respecting prosecution for criminal offenses, as within contemplation of statute."

Divorce — cruelty in giving away property. In *Mark v. Mark*, 145 Ohio St 301, 160 ALR 608, 61 NE2d 595, Judge Turner wrote a four to three opinion from which there was strong dissent by Judge Hart holding that where there is no invasion of a wife's present existing right

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to support, the fact that her husband has made large inter vivos gifts to his children by a former marriage, in order to prevent her from enjoying the property after his decease, will not warrant the granting of a divorce on the ground that in so doing the husband has been guilty of either gross neglect of duty or extreme cruelty, although the effect of such gifts may be to undermine the wife's economic security and to render her dependent on charity for support after his death.

The annotation on page 608 discusses "Divorce on ground of husband's gifts of his property to third persons."

Divorce — breach of covenant against molestation in separation agreement. In *Smith v. Smith*, 225 NC 189, 160 ALR 460, 34 SE2d 148, Judge Windbourne wrote a very practical opinion holding that breach by a wife of a covenant in a separation agreement that she will not molest, disturb, or speak disparagingly of her husband is no defense to an action by her to enforce a provision of the agreement requiring him to make payments for her support and for release of her marital rights in his property.

The annotation in 160 ALR 471 discusses "Effect of breach of provision in separation agreement against molestation on right to enforce other provisions of agreement."

Fish and Game Commission — action of claim and delivery. Judge Adair in *Heiser v. Severy* (Mont) 160 ALR 319, 158 P2d 501, wrote an interesting opinion holding that an action of claim and delivery against the State Fish and Game Commission and its agents in their official capacity to obtain the return of a gun alleged to have been unlawfully seized, or its value, is one against the state, and therefore is not maintainable without the state's consent.

The annotation in 160 ALR 332 discusses "Suit against public officer to recover possession of property as suit against state or Federal government."

Foreign divorce — conclusiveness as to the custody of child. Justice Stone wrote the opinion of the court in *McMillin v. McMillin* (Colo) 160 ALR 396, 158 P2d 444, holding that an award, in a divorce action, of the custody of an infant child by a court having jurisdiction should be recognized by other states.

A supplemental annotation to others in the series discusses "Extraterritorial effect of provision in decree of divorce as to custody of child."

Gifts — unreasonableness of amount. The Arizona Supreme Court in an opinion by Judge Morgan in *Amado v. Aguirre* (Ariz) 160 ALR 1126, 161 P2d 117, held that in the absence of a statute to the contrary, a person of adequate mentality has

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the right to give away any part or all of his property if he wishes to do so.

The annotation in 160 ALR 1133 discusses "Improvidence of donor as affecting validity of gift."

Gift Taxes — valuation of stock for purpose of. In *Zanuck v. Commissioner of Int. Rev.*, 149 F2d 714, 160 ALR 661, Judge Bone of the Ninth Circuit of the United States Circuit Court of Appeals wrote the opinion holding that evaluation by the Commissioner of Internal Revenue and the Tax Court of common stock of the Twentieth Century-Fox Film Corporation for purposes of gift tax at the mean between the highest and lowest selling quoted prices on the New York Stock Exchange on the date of the transfers (October, 1939) did not as a matter of law involve an improper criterion of value, the Tax Court having considered all available evidence presented by both parties, despite the taxpayer's contention that the beginning of World War II and the labor troubles confronting the movie industry were "unusual circumstances" which rendered improper the use of market price as a criterion of value.

The annotation in 160 ALR 669 discusses "Valuation of corporate stock for purposes of gift tax."

Homicide — negligence in operation of automobile. Chief

Justice Larson in *State v. Olsen (Utah)* 160 ALR 508, 160 P2d 427, held that one may be found criminally negligent in the operation of an automobile which while he was asleep ran up on a curb and killed a pedestrian, if while driving he allowed himself to get in a condition where he was likely to fall asleep at the wheel.

The annotation in 160 ALR 515 discusses "Sleep or drowsiness of operator of automobile as affecting charge of negligent homicide."

Husband and Wife — husband's right to sue wife for personal injury. The Wisconsin Supreme Court in *Fehr v. Gen-*



eral Accident F. and L. Assurance Corp., 246 Wis 228, 160 ALR 1402, 16 NW2d 787, opinion by Judge Barlow held that no right is conferred upon a husband to maintain an action against his wife for personal injuries caused by her negligence by a statute enlarging the rights of married women by providing that a married woman may sue in her own name and shall have all the remedies of an unmarried woman with respect to her separate property or business and to recover earnings, and shall be liable to be sued in respect of her separate property or business as though unmarried, that she may sue in her own name for injuries to her person or character or for alienation of her husband's affections, and that women shall have the same rights and privileges as men.

Supplementing earlier notes in the series, the annotation in 160 ALR 1406 discusses "Right of one spouse to maintain action against other for personal injury."

Income Taxes — income from source within U. S. United States Circuit Judge Soper wrote the opinion in *Hay v. Commissioner*, 145 F2d 1001, 160 ALR 548, holding that the profit realized upon the liquidation of a personal holding company, organized under the laws of California, at the instance of a Bahaman corporation organized by the sole stockholder of

the California company, to which he had transferred the stock of the California company with a view to escaping estate and income taxes, is taxable to such stockholder, a British subject, as income of a nonresident from sources within the United States.

A practical annotation in 160 ALR 559 discusses "Source of income as within or without the United States under the Internal Revenue Code."

Insurance — effect of misrepresentation as to age of insured. Commissioner Hyde prepared the opinion of the Court in *Johnson v. Central Mutual Insurance Co.*, 346 Mo 818, 160 ALR 289, 143 SW2d 257, holding that the statutory rule that misrepresentation will not avoid an insurance policy, unless the matter misrepresented shall actually have contributed to the contingency on which the policy is payable, is inapplicable to a misrepresentation as to the age of the insured where he was in fact beyond the age limit within which insurance is, under the rules of the insurer, procurable, even though it was within the authority of the insurer's board of directors to increase the age limit.

Supplementing an earlier annotation in 1 ALR 459, the annotation in 160 ALR 295 discusses all the later cases on this interesting question "Insurance: incorrect statement of age."

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Joint Creditors and Debtors — judgment against joint tort-feasors. In *Anstine v. Pennsylvania Railroad Co. (Pa)* 160 ALR 981, 43 A2d 109, the Pennsylvania Supreme Court held that one who, having recovered a verdict against joint tort-feasors, has voluntarily remitted a portion thereof as an alternative to the granting of a motion by one of the defendants for a new trial, entering judgment against such one for the reduced amount which has been paid, but has caused judgment to be entered against the other for the amount of the verdict, is not entitled to enforce the latter judgment for the difference between the amount he has received and the amount of the latter judgment.

The annotation in 160 ALR 984 discusses "Remittitur on which court has conditioned refusal of new trial or reversal, as insuring to benefit of codefendant failing to move for new trial or to appeal."

Joint Creditors and Debtors — release by agreement not to enforce judgment against one. In *Pellett v. Sonotone Corporation*, 26 Cal2d Adv p 614, 160 ALR 863, 160 P2d 783, opinion by Chief Justice Gibson, the California Supreme Court held that an agreement by plaintiff with one of the defendants in a pending action against them as joint tort-feasors whereby, upon a purported nominal money con-

sideration and the latter's agreement to defend the action until verdict or nonsuit, the plaintiff covenants not to levy execution upon, or to make any demand for the payment of, any judgment that might be entered against him, does not amount to a release, and while not strictly a covenant not to sue, is closely akin to such a covenant, and does not operate to release the other joint tort-feasors.

The annotation in 160 ALR 870 discusses "Agreement with one tort-feasor that any judgment that may be recovered will not be enforced against him, as affecting liability of cotort-feasor."



"But, your Honor! I just pinched him for selling on a corner without a license."

Labor Dispute — construction of constitution of labor organization. Chief Justice Loring in

Minnesota Council v. American Federation (Minn) 160 ALR 533, 19 NW2d 414, held that a controversy as to whether conditions fixed by the constitution of a labor organization have been met by its central body in suspending the charter of a state council is not within the operation of a statute restricting the issuance of injunctions in labor disputes and defining the term "labor dispute" as including any controversy concerning terms or conditions of employment or concerning association or representation of persons in negotiating terms or conditions of employment.

The annotation in 160 ALR 544 discusses "Controversy between labor union and members or subordinate groups thereof as labor dispute within anti-injunction statute."

Labor organizations — right to limit membership as affected by closed-shop agreement. The California Supreme Court decided a very important labor case in James v. Marinship Corp., 25 Cal2d 721, 160 ALR 900, 155 P2d 329. In an opinion by Chief Justice Gibson the case holds that a labor union which, by means of closed-shop agreements, has obtained a monopoly of opportunities for employment in an industry, may not arbitrarily exclude qualified persons from membership or deny to them any of the privileges of full membership; it may not

maintain both a closed shop and an arbitrarily closed or partially closed union.

The annotation in 160 ALR 918 discusses "Closed shops and closed unions."

Partnership — exercise of option to purchase copartner's interest after dissolution. In Hagan v. Dundore (Md) 160 ALR 517, 43 A2d 181, Judge Collins wrote a very able opinion holding that a right conferred upon one partner by the partnership agreement to purchase, at any time during the life of the agreement, upon specified notice, all or any part of the interest of the other, at its book value, and thereby to alter the proportions in which they shall share in the profits, is not destroyed by the dissolution of the partnership by the act of the other partner, but may be exercised within a reasonable time thereafter.

The annotation in 160 ALR 523 discusses the broader question of "Provision of partnership agreement giving one partner option to buy out the other."

Railroads — gate tender's negligence at crossing. The Massachusetts court in Quimby v. Boston and Maine R. R. (Mass) 160 ALR 724, 61 NE2d 853, opinion by Chief Justice Field held that a finding of negligence on the part of a gate tender at a railroad crossing in delaying opening the gates to allow free passage of plaintiff, who entered the crossing before the lowering

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of the gates, is not precluded by evidence that after the plaintiff had stopped his car to avoid striking the gates he was unable to start the motor, there being evidence warranting a finding that in the exercise of reasonable care the gate tender should have started to raise the gates before the automobile stopped, even though he was not bound to anticipate that the motor would not start after the automobile was stopped.

The annotation in 160 ALR 731 treats the broad question of "What amounts to negligence of gate tender at railroad crossing."

Sale — disclaimer of warranty. In *Kennedy v. Cornhusker Hybrid Co.* (Neb) 160 ALR 351, 19 NW2d 51, Judge Chappell held that the buyer's lack of notice or knowledge of a disclaimer of warranty does not avoid its effect in the absence of express representations, bad faith, fraud, or concealment, if the disclaimer is so expressed that the buyer ought to be aware of it.

See the extensive annotation in 160 ALR 357 under the title "Necessity of buyer's actual knowledge of disclaimer of warranty of personal property."

Schools — liability for injury to one attending game. Judge Leiper in *Rodes v. School District* (Mont) 160 ALR 1, 142 P2d 890, held that neither a school district nor its trustees, as such or individually, are liable for the defective condition of the school

gymnasium to a member of the general public who paid admission to witness a basket ball game between the school team and a team representing a neighboring school, since they are deemed to have been acting in a governmental rather than a proprietary capacity.

The annotation in 160 ALR 7 discusses "Tort liability of public schools and institutions of higher learning."



Send a squad car quick! I just located "Light-fingered Louie!"

Schools — private school's liability for condition of adjoining premises. Justice Moss in the case of *Conley v. Martin* (RI) 160 ALR 246, 42 A2d 26, wrote the opinion of the court holding that the proprietor of a private school for the treatment and cure of young persons afflicted with stammering is, as a matter

of law, not guilty of negligence in failing to keep in repair a silo built of brick and irregularly shaped flat stones on his adjoining farm property, which pupils were forbidden to enter, in consequence of which a projecting stone gave way when one of his pupils stepped on it in attempting to climb to a ledge about 6 feet above the ground, causing the pupil to fall, where the silo was some distance from the school and could not be reached except by passing through a dump or a pigpen and climbing fences.

The annotation in 160 ALR 250 discusses the broad question of "Tort liability of private schools and institutions of higher learning."

Sherman Anti-trust Act — violation, effect of own participation on recovery. Judge Clark of the United States Circuit Court of Appeals for the Second Circuit wrote the opinion in *Ring v. Spina*, 148 F2d 647, 160 ALR 371, holding that one who was constrained to enter into an agreement with a playwrights' guild, in order to protect an investment which he had made in a projected production of a play, may not be denied relief in an action for damages against the guild under the Sherman Act, on the ground that he was a participant in the unlawful combination in restraint of interstate commerce thereby created, even if techni-

cally he may be considered as in pari delicto.

The annotation in 160 ALR 381 discusses the question "Participation in illegal combination as defense to action under Anti-trust Act."

Sidewalks — liability for dangerous condition. The Utah Supreme Court opinion by Chief Justice Larson held in *Salt Lake City v. Schubach* (Utah) 160 ALR 809, 159 P2d 149, that one who, with the permission of the city, has installed a trap door in a public sidewalk as a means of access to a basement is not relieved from liability to the city for damages recovered by a pedestrian in consequence of its disrepair, by reason of the fact that the premises are leased to tenants who have common rights in the trap door.

The annotation in 160 ALR 826 discusses "Lease of premises as affecting owner's liability for injury arising out of condition in highway connected with use of property."

Subrogation — protection of contingent right. Judge Thomas in *Cornett's Executor v. Rice*, 299 Ky 256, 160 ALR 413, 187 SW2d 454, in a very well reasoned opinion held that a surety need not pay the debt secured in order to obtain protection, as against a junior lien, of his right to subrogation, contingent upon paying the debt, to any lien which the creditor holds against the property of the principal.

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The circumstances under which a surety who has not paid the debt has been held entitled to a judicial protection of his rights are set out in the annotation in 160 ALR 421.

Taxes — note given by resident to nonresident. The Georgia Court, opinion by Pratt, J., in *Davis v. Penn. Mutual Life Insurance Co.*, 198 Ga 778, 160 ALR 778, 32 SE2d 180, held that a note executed by a resident of the state, but owned by a nonresident and held by him at his domicil out of the state, may be taxed in the state only if it is derived from, or is used as an incident of, property owned or of a business conducted by the nonresident or his agent in the state; and this is true although the note may be secured by a mortgage on land situated in the state.

The annotation in 160 ALR 788 discusses "Domicil of debtor within state, or location therein of real property securing debt, as giving debt to nonresident a situs within state for purpose of property taxation."

Trial — correction of record. Chief Judge Maxey wrote a well-reasoned opinion in the case of *Maize v. Atlantic Refining Co.*, 352 Pa 51, 160 ALR 449, 41 A2d 850, which holds that the clerical error of the trial judge in recording the verdict of the jury in a death action, in reversing the amounts which the jury intended to allow to the family

and to the estate of the deceased, respectively, may be corrected by the court where the facts are undisputed and no objection is made by, or on behalf of, any party in interest.

The annotation on page 457 discusses "Power of trial court or appellate court to correct former misinterpretation of jury's verdict."

Trusts — accumulation for indefinite period. On *Gaess v. Gaess*, 132 Conn 96, 160 ALR 432, 42 A2d 796, Chief Justice Maltbie wrote an interesting opinion holding that a trust to accumulate for an indefinite period is invalid only as to the period beyond the permissible limit of such a trust.

The cases including both English and American are collected and well discussed in the annotation in 160 ALR 439.

Trusts — constructive trust from grantee's repudiation of agreement with grantor. Justice Stukes in the case of *All v. Prillaman*, 200 SC 279, 159 ALR 981, 20 SE2d 741, in a well-reasoned opinion held that repudiation by a son of an alleged agreement with his mother, upon her transfer to him of the title to property, that if he could preserve it against the claims of creditors, he would hold it for the benefit of the family, is insufficient to give rise to a constructive trust, in the absence of a showing of any promise fraudulently made by the son to in-

duce the mother to convey property to him, or that he in any way overreached her or abused any confidential relation that may have existed between them.

The annotation in 159 ALR 997 supplements exhaustive earlier annotations on the question of oral trusts by grantees.

Unemployment Compensation — salesmen on commission. The Washington Supreme Court, opinion by Judge Blake, held in *State v. Superior Court*, 22 Wash 2d 811, 160 ALR 692, 157 P2d 938, that one selling oleomargarine on orders obtained from ultimate consumers through agents who make delivery of the goods and collect the money therefor, and who are compensated by a commission on the purchase price, is an "employer" of such agents within the Washington Unemployment Compensation Act and as such liable to contribute to the unemployment compensation fund, although such agents handle other food products for other manufacturers or producers, pay their own expenses, and perform their services as best suits their own convenience.

The annotation in 160 ALR 713 discusses this question

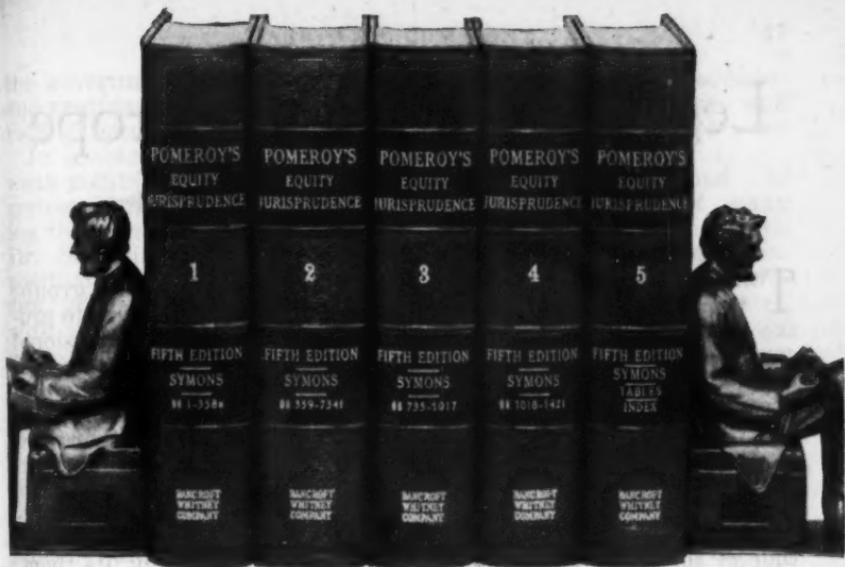
"Sales on commission as within unemployment compensation or social security acts."

Wills — nature of interest of spouse electing against will. In *Barlow v. Winters National Bank and Trust Co.*, 145 Ohio St 270, 160 ALR 423, 61 NE2d 603, Judge Hart wrote an opinion holding that the interest taken by a widow electing against a husband's will by which his real estate was devised to a trustee, under a statute entitling her to take as in case of intestacy, is not converted from an estate in inheritance in the real estate, subject to the payment of debts of the estate, carrying with it rentals accruing since the husband's death, into a distributive share measured in money, by a statutory provision that, in the event of election to take under the statute of descent and distribution, the surviving spouse "shall take not to exceed one half of the net estate."

The question discussed in the annotation in 160 ALR 429 is "Does surviving spouse who elects against will take by way of distributive share or by way of inheritance from deceased spouse?"

The dogmas of the quiet past are inadequate to the stormy present . . . As our case is new, so must we think anew and act anew.

—Abraham Lincoln, in his message to Congress,
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Legal Education in Europe

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THAT European legal education was designed to serve the needs of the higher civil service as well as those of the bar and bench, thereby differing greatly from legal training in the United States, is an important emphasis in a study recently released by the Russell Sage Foundation.

Dr. Eric F. Schweinburg, author of the study and holder of a doctorate in law from the University of Vienna, points out that in general law training in Continental Europe consists of two parts: a nonprofessional course of study in the law department of a university, called law faculty; a professional apprenticeship training in courts, administrative departments, law and notary offices.

The first, or nonprofessional portion of the training, does not attempt to equip young men for immediate practice of the law; the student is guided toward a scientific approach to any problem arising from the clash of individual interests with one another, or with the interests of groups or that of society as a whole. Graduation from the law, or combined law and political science faculty, is the entree

to a distinct intellectual group; some members of this group proceed through the professional apprenticeship training to the law proper, as lawyers, judges, law teachers, public prosecutors, notaries; but many others become public administrators, civil servants of various types, or serve private business in ways for which their broadly basic legal training especially fits them.

Dr. Schweinburg's study, which is entitled *Law Training in Continental Europe: Its Principles and Public Function*, offers a detailed picture of both the preprofessional training in the law faculty and the apprenticeship training as practiced in Austria before the war, with briefer notes on France, Germany, and the Soviet Union. The pattern in the Soviet differs markedly from that in the rest of Europe. Thorough indoctrination with Marxism and Leninism pervades the training. Institutions offering legal education are plant-schools for the training of government servants with any sort of legal function, and of the re-established Soviet bar. Admission to a law school is won by competitive examination, with stipend supplied by

the government and its amount and continuance dependent upon rate of progress.

In assessing the strong and weak points of the more general system of law training prevailing through the rest of Europe, Dr. Schweinburg puts on the positive side (1) the preuniversity education—the advantage with which Continental legal education begins, because of the merits of the secondary schools; (2) the non-professional character of the university education; (3) the extensive treatment of public law and of some fields of the social sciences; (4) the historical courses, giving the student a broadness of approach to law which the lawyer trained under less elaborate systems apparently never attains; (5) the apprenticeship training.

"Because of its ample theoretical foundations and its added professional preparation, Continental law training," the author points out, "requires from seven to eleven years. This impressive investment of time and effort is not wasted."

"The affirmative evaluation," warns Dr. Schweinburg, "is subject to the reservation that Con-

tinental legal education successfully prepares lawyers and administrators as both are commonly conceived of. If lawyers are proud of the accomplishments of many of their brethren as politicians, legislators, administrators, statesmen, spiritual leaders, they forget that the contribution that has been made to the work of those men by their law training was only technical, and hence subservient. In spite of their pride in outstanding colleagues, lawyers do nothing to liberate law training from its technical and narrow spirit.

"Law training, as still carried on in Europe, forces students and accomplished lawyers alike to look upon law as something static and abstract. They are not guided to see it as continually created and creative, and to feel themselves called upon to direct it in both of these aspects. Thus the lawyer still fails to think of law along great, living lines. He acquires, together with a stupendous incisiveness concerning detail, an equally stupendous neglect of the large implications of his social task."

A Safe Bet

"Do you want to bet me 30 days you'll never show up in town again?"—Judge Don G. Allen, Des Moines, addressing young blonde about to receive sentence for intoxication. Blonde said, "I sure do, Judge!" Allen changed sentence to 30 days, suspended, warning: "Be careful! I always collect my bets!"

Quote

SCREWS V. UNITED STATES

The Georgia Police Brutality Case

By Robert K. Carr, Professor of Government, Dartmouth College

Condensed from Cornell Law Quarterly, September, 1945

IN THE case of *Screws v. United States*, 325 US 91, 89 L ed 1495, 65 S Ct 1031, decided on May 7, 1945, the Supreme Court of the United States rendered a decision profoundly important to the cause of civil liberty.

Claud Screws was the sheriff of Baker County. Aided by the defendant Jones, a policeman in the town of Newton in Baker County, and the defendant Kelley, a deputy sheriff, he arrested Robert Hall, a negro citizen of the United States, late on the night of January 29, 1943, on a warrant charging theft of a tire. Hall was handcuffed and taken by car to the courthouse. There, as he left the car, he was beaten by the three men with their fists and a two-pound blackjack. The defendants claimed that Hall used insulting language and, although he was still handcuffed, that he reached for a gun. Thereafter he was knocked to the ground and beaten for from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the courthouse yard into the jail and thrown upon the floor dying. An ambulance was

called and he was taken to a hospital where he died within an hour without regaining consciousness. There was evidence that Screws and Hall had had a previous altercation over the possession of a gun by Hall, as the result of which Screws nursed a grudge against Hall and had threatened to "get" him.

The case was brought to the attention of the Civil Rights Section by a negro newspaper and the local United States Attorney, and while the usual investigatory machinery of the Department of Justice was at once set in motion there is evidence in the Department's file of the case that every effort was made to encourage the state of Georgia to prosecute the offenders. The reasons for Georgia's failure to take any action in such an extreme case are not entirely clear; for one thing the Georgia Solicitor General for that district whose duty it was to start proceedings in such a case is reported to have felt "helpless in the matter." "He has no investigative facilities and has to rely upon the sheriff and policemen of the various counties of his circuit for



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investigation." Here, such assistance would have had to come from the accused persons, themselves! At any rate the United States Attorney with the approval of the Justice Department finally brought the case to the attention of a federal grand jury and in April an indictment was returned on three counts. The first count charged a violation of Section 51, the second count a violation of Section 52, and the third count charged a conspiracy under Section 88 of Title 18 of the United States Code to violate Section 52. One reason for the three counts was to increase the maximum penalty that might be imposed upon conviction of the defendants. The use of 51, which carries much heavier penalties than 52, was presumably based on the theory that it may be applied to public officers as well as private persons who conspire to deprive a United States citizen of his federal rights. However, Federal District Judge Deaver, while overruling a demurrer as to counts two and three, upheld a demurrer as to this first count and the Solicitor General of the United States ultimately decided against appealing this ruling to the Supreme Court, and the Section 51 element went out of the case for good. The theory of the indictment under 52 was that Hall had been deprived *under color of the law* of Georgia of rights guaranteed to him by

the Fourteenth Amendment—"the right not to be deprived of life without due process of law; the right to be tried, upon the charge on which he was arrested, by due process of law and if found guilty to be punished in accordance with the laws of Georgia."

The case was tried by a jury and a verdict of guilty was returned against all three defendants. A fine and imprisonment on each of the two remaining counts was imposed making a total fine of \$1,000 and a prison term of three years. On appeal the United States Circuit Court of Appeals for the Fifth Circuit affirmed this conviction by a two to one vote. Thereupon the Supreme Court took jurisdiction on a writ of certiorari to the Circuit Court of Appeals.

THE DOUGLAS OPINION

The first of the four opinions in the case is written by Justice Douglas, Chief Justice Stone and Justices Black and Reed concurring in this opinion.

The Issue of Vagueness: The opinion first considers the argument that Section 52 is unconstitutional as used to protect rights guaranteed by the Fourteenth Amendment. The argument is outlined as follows: The statute lacks the basic specificity necessary for criminal statutes under our system of government because as applied to the Fourteenth Amendment it fails to

provide an ascertainable standard of guilt.

Accordingly, it is argued that a state law enforcement officer cannot know what rights he must respect under the Fourteenth Amendment if he is to avoid criminal prosecution under 52. "To enforce such a statute would be like sanctioning the practice of Caligula who published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it."

Justice Douglas is sincerely bothered by the weight of this argument. Fortunately, the Justice states, there is a way of construing the statute more narrowly than it has been by the lower courts in this case so that "it can be preserved as one of the sanctions to the great rights which the Fourteenth Amendment was designed to secure."

This more narrow interpretation depends upon the meaning of the word, "willful." To hold here that "willful" connotes "a purpose to deprive a person of a specific constitutional right" will "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

But if the word, "willful" in the statute means that the accused must have sought to deprive a person of a specific constitutional or statutory right, how is he to know with sufficient definiteness the range of

rights that are constitutional? The answer is provided that there must be an intent to deprive a person of a right which rests upon any one of three bases, "a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them."

The case against Screws might well seem to meet this test. But the conviction is now set aside and a new trial ordered on the ground that the trial judge failed properly to instruct the jury on this point of the willfulness of the defendants' action.

The Issue of "Color of Law":
Justice Douglas turns next to

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the problem whether the defendants acted under "color of law," as expressly required by Section 52. If they did not act under "color of law" theirs was a crime committed by private individuals and there could be no federal prosecution under 52.

Earlier decisions are cited, and the legislative history of Section 52 is touched upon again, to refute the contention that "color of law" was intended "to include only action taken by officials pursuant to state law."

The Issue of Federal-State Relations: All four opinions give attention to the way in which the use of Section 52 in this case affects the equilibrium of the relationship between fed-

eral and state governments. Justice Douglas sees no serious difficulty here. He agrees that under our system of government the administration of criminal justice rests largely with the states. But he sees nothing in our constitutional traditions to prevent Congress from making the act of a state officer a federal crime where that act deprives a person of a right secured by the Constitution or federal law.

THE RUTLEDGE OPINION

Justice Rutledge's lengthy opinion begins and ends with a reference to the difficult position in which the nine justices find themselves in this case. His desire is to vote with Justice Murphy to affirm the conviction. But that would leave four justices voting to order a new trial although upholding the constitutionality of Section 52, and three justices voting to declare Section 52 unconstitutional. Thus to make it possible for the Court to dispose of the case, and because his views are much closer to those expressed in the Douglas opinion than they are to the views of the justices favoring outright reversal, he agrees that the decision of the court of appeals should be reversed and a new trial ordered in the district court.

THE MURPHY OPINION

The Murphy dissenting opinion is short, straightforward



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and eloquent. Quite obviously Justice Murphy has little patience with the lengthy, technical analysis to be found in the other three opinions of his colleagues. To him the Court's problem is a simple one: Section 52 makes it a federal crime for a public officer to deprive a person of a constitutional right; the Fourteenth Amendment clearly guarantees the right not to be deprived of life by state action without due process of law; Screws, Jones and Kelley, acting pursuant to state authority, wantonly killed a prisoner in their custody; there can accordingly be no doubt about the correctness of their conviction.

THE ROBERTS, FRANKFURTER, JACKSON OPINION

It is the opinion of these three dissenting justices that Section 52, as employed in this case, is unconstitutional and that the defendants are entitled to go free. The opinion is a vigorous one and it is no mere technical difference that separates the nine justices. The opening paragraphs of this opinion bristle with strongly-worded phrases that reveal a complete and thorough-going distaste for the majority position. "Instead of leaving this misdeed to vindication by Georgia law, the United States deflected Georgia's responsibility by instituting a federal prosecution." Section 52 "has remained a dead letter all

these years." There is a reference to ". . . this patently local crime." It is asked "whether the States should be relieved from responsibility to bring their law officers to book for homicide, by allowing prosecutions in the federal courts for a relatively minor offense carrying a short sentence." And we are told, "It is familiar history that much of this legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction era."

THE MEANING OF SCREWS V. UNITED STATES

It is difficult to avoid a first reaction of disappointment to the decision in the case. Screws' crime was a particularly heinous one and is certainly typical of one of the most serious threats to civil liberty in the country today.

The more lasting impression of the decision is that it represents a distinct victory for the cause of civil liberty, although the majority position is a compromise one.

The Civil Rights Section regards the decision as a victory. It has always pursued a policy of confining prosecutive action to the strongest cases only. And it believes that if a jury is otherwise persuaded that the accused is guilty and is inclined to convict it will not be deterred by vague, technical doubts as to the

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"willfullness" of his action however carefully the judge may have charged the jury on this point.

There is a deeper significance to *Screws v. United States*. The decision proves once more that power can be found within the words of the Constitution enabling the national government to function as a positive instru-

mentality for the protection of civil liberty.

This is of first importance if one accepts the premise that in the never-ending struggle to make civil liberty in America more secure the positive employment of federal power toward that end is a weapon that can prove exceedingly useful.

Stage Law

In a letter to the English publication, *The Law Times*, (August 25, 1945) Kenneth Brown shows that stage law there follows the same pattern as stage law in America.

"The death of Sir Bernard Partidge recalls the fact that no less than 56 years ago he illustrated Jerome K. Jerome's brilliant skit 'Stage-Land,' a book that surely better deserves reprinting than the aquatic adventures of any triumvirate, to say nothing of its canine retainer.

"Amongst other happy thoughts we learn from it that 'the Stage Lawyer' (whose favourite remark is 'Ah') 'never has any office of his own. He transacts all his business at his client's houses. He will travel hundreds of miles to tell them the most trivial piece of legal information.'

"The author, moreover, deduced (inter alia) the following points of stage law:—

"That if a man dies, without leaving a will, then all his property goes to the nearest villain.

"Identification in this event is rendered the easier in that the villain 'wears a clean collar, and smokes a cigarette; that is how we know he is a villain.'

"But that if a man dies, and leaves a will, then his property goes to whoever can get possession of that will.

"That the accidental loss of the three and sixpenny copy of a marriage certificate annuls the marriage.

"That ten minutes' notice is all that is required to foreclose a mortgage.

"That the evidence of one prejudiced witness, of shady antecedents, is quite sufficient to convict the most stainless and irreproachable gentleman of crimes for the committal of which he could have no possible motive.

"But that this evidence may be rebutted, years afterwards, and the conviction quashed without further trial by the unsupported statement of the comic man."

"Meet The Gang"

By Bernard Rosenberg

Of the New York Bar



Condensed from The
Journal of Criminal
Law and Criminol-
ogy, July-August,
1945

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HE HAD been an inmate at Sing Sing Prison for a "stick-up with a gun," and he went by the name of "Pete the Bug." The prison records showed that Pete had an I. Q. of one hundred eighteen—the mark of a person of superior intelligence. Yet, there was his monicker bearing proof that Pete was not completely "right in the head."

I asked around, and finally the reason for "Bug's" name filtered through by way of his brother. Pete was a "nut," a "Billy Noodle," a "guy" who thought that every girl he met was in love with him.

Name labeling is a regular practice in "the stir," and in the neighborhoods where "the boys" come from. They size each other up, and then, put their findings in pithy nicknames—names which explain the man in a word—his weakness, his racket, how he works, or some peculiarity about him.

Doesn't the name "Cue-Ball" describe succinctly a young fellow with no hair on his head?

Doesn't "Satchels" convey the picture of a man with feet as large as barge boats? What better way is there to characterize someone who has "the face of an angel, and the heart of a killer," than by tagging him "Baby-Face," "Angel," "Sonny," or "Christ-Kid"? Doesn't the name "One-Lung" clearly point to a "T. B. case;" "Hop-a-Long" to a cripple; "Boozehound" to a drunk; "Gabby" to a fellow who talks too much; and "Tool" to a man who is used by others to do the dirty work?

"Pincushion Mike" got his monicker from his method of working. He would stand at busy street corners and stick needles into his arms, cheeks, and legs until a crowd gathered. Then, while Mike gave his one-man show, his brother, "Nick the Dip," would go to work—his fingers hooking wallets out of the pockets of the audience.

William Poole of the notorious Bowery Boys used a butcher knife when he fought in gang wars and when he had a private job to do now and then. His

sobriquet was "Butcher Bill." "Butcher," it is said, was able to place a knife through an inch of pine wood at a distance of twenty feet.

Many criminals are labeled "Barber," but this does not mean that they are in the business of giving haircuts. Their racket is often that of slashing the cheek of a "stool-pigeon" for a price.

Sometimes names of knifemen point up the cutting instrument used by them in carrying out an assignment. Riley of the Gopher Gang wielded a razor when he worked, and he was called "Razor Riley." "Tony the Shiv" was as skillful with a blade as any surgeon could be.

Every type of work has its trade-name and many a criminal is marked by the trade he follows. The man who sits in the car while other members of the outfit "heist the joint" is known as a "lookout." "Bull" is a strong man—one who uses physical force to get what he wants. "Fence" is a receiver of stolen goods; "Fly" is a sec-

ond story man, and "Peterman" is a safecracker. So a man may be known as "Bull Frankie," "Oscar the Fence," "Tom the Fly," and "Peterman Joe," depending upon the "occupation" he follows.

Mimi Lepreuil was called "Golden Hand." His name resulted from his success in lifting large sums of money when he picked pockets. Joe Golden, head of a "confidence mob," went by the name of "The Butter Kid," and Nathan Kaplan became "Kid Dropper," because as a youngster, he was expert in "the drop," one of the oldest of the confidence games.

Johnny was in the business of stealing automobiles. One day "coppers" shot at the car which Johnny was driving and pouf went the tires of the automobile. Johnny was arrested and "sent up the river to do a bit." Johnny was baptized anew while up in "the can." He was nicknamed "Johnny Flat-Tire."

One day a would-be tough guy named Tony decided to "knock-off" a house of prostitution for

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the dough he thought he could take. Tony talked it over with "Abie the Lug," and that night they stuck the place up. Why not mix business and pleasure, Tony thought, after collecting the sum of thirty dollars and forty-two cents. He handed his gun to "The Lug" and selected a cute blonde. Poor Tony! The police walked in at the most inopportune moment. But, don't think "the boys" in the Big House didn't learn about Tony's mixing business and pleasure. Tony became "Tony the Jerk," in no time.

A beautiful beard and a large handlebar moustache gave one thug the name of "Don Whiskerandos," while "Diamond Charley's" name was the result of wearing sparklers on his shirt-front. "Diamond Charley" could well afford sparklers. He had made his fortune selling

"knockout drops" to harlots and thugs.

Can you think of a better name to describe the owner of a half-dozen houses of ill-fame than that of "Red-Light Lizzie"? What about "Jane, the Grabber," for a woman whose racket was abducting young girls for houses of prostitution? Doesn't "Sparrow" sort of fit a young piece of sugar who flits from lover to lover?

But alas, "the boys" did make a mistake once in sizing up a member of a "mob." Eddie Jackson, pickpocket out of Chicago, got himself called "Eddie the Immune" because he had served only ten days in houses of correction for the first ten years of his professional career. "The boys" gave him his name too soon, however. The next thirty years brought Eddie's misfortune. He served ten years in "the stir."

Chickens as Nuisance Per Se

Vice Chancellor Jayne denied an injunction in *Vaszil v. Molnar*, 133 NJ Eq 577, saying:

"It will be presupposed that the roosters will strut, wax indignant and crow. Yet, they too have moments of grave serenity. The hens will perambulate, scratch and cackle. Nevertheless, I decline to adjudge that the keeping of chickens is in all circumstances a nuisance per se.

"Sound is of course a general term; noise imports a confused or discordant sound. Sounds which are ignored by some are discomforting to others. Shakespeare, as I recall, portrayed the rooster as the 'trumpet of the morn.' It is conceivable that the brook babbling in its passage might be vexatious to one of exceptional neurotic sensitivity. Then, there are those who regard all noises as objectionable except those they make themselves."



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Re-employment Rights of Veterans in Private Industry



The Emblem of Honorable Discharge

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MEN and women returning from military service find themselves, in countless cases, in competition for jobs with persons who have been filling them in their absence. Congress has attempted to remedy this evil. It has recognized that such competition is not part of a fair and just system. Accordingly, it has enacted legislation¹ designed to minimize, in so far as possible, the sacrifices of those who entered the armed forces, by assuring them that their jobs, their pay, and their status with their employers should be secured to them in their absence against replacement by substitutes who may be able, either by greater efficiency or more acceptable personalities, to make it desirable for employers to make the changes permanent ones.

PERSONS ENTITLED TO BENEFITS

Any person inducted into the land or naval forces of the United States under the provisions of the Selective Training and Service Act of 1940² or entering active military or naval service after May 1, 1940,³ any member of the reserve forces assigned to active duty,⁴ and any person entering the service of the merchant marine after May 1, 1940,⁵ is entitled to the same benefits as under the Selective Training and Service Act of 1940 with respect to restoration to jobs or positions previously held in private employment, whether as laborers, mechanics, or in a pro-

¹ 50 USC Appx, § 308.

² 50 USC Appx, 308(a).

³ 50 USC Appx, 357.

⁴ 50 USC Appx, 403.

⁵ 50 USC Appx, 1472.

fessional capacity.⁶ But these benefits do not extend to those whose previous employment was purely temporary.⁷

RIGHTS ON RESTORATION

By the terms of the act, restoration must be without loss of seniority or of participation in insurance or other benefits regularly given by employers to employees on leave of absence, and with protection against discharge without cause within one year after restoration.⁸ However, if the employer's circum-

⁶ Kay v. General Cable Corp. (1944; CCA 3d) 144 F2d 653.

⁷ 50 USC Appx, §§ 308(b), 403(b), 472(a), 1472(a).

⁸ 50 USC Appx, §§ 308(d), 357, 403, 1472.

It is interesting to note that the statute provides that a veteran shall be restored to "such position." Did Congress intend to differentiate between "position" and "job"? Certainly they do not always mean the same thing. A workman at a drill press and one at a lathe undoubtedly have different jobs, but if both have equal seniority rights and are equally next in line for promotion to shop foreman, may they not be said to have the same "position." Therefore, when Congress used the word "position," did it mean to require that a veteran who had left a drill press to enter the armed forces must be returned to the drill press, or did it mean simply that he must be returned to the same position in rank? The Selective Service System adopts the view that Congress used the term "position" in the same sense as "job" and meant where possible that a veteran should be returned to the same job. But in the final analysis the determination is up to the courts.

stances have changed to an extent where it is impossible or unreasonable to restore the veteran to his former position or one of like status, such restoration need not be made.⁹ The phrase "unless the employer's circumstances have so changed as to make it impossible or unreasonable," as used in the statute, is intended to provide for cases where necessary reduction of an employer's operating force or discontinuance of some particular department or activity would mean simply creating a useless job in order to re-employ a veteran. It does not include a case where it would merely make for greater efficiency for a company to continue in its employment, in the place and stead of a veteran, one who has taken his position while he was absent in the military service.¹⁰

APPLICATION FOR RE-EMPLOYMENT; NECESSARY PRE-REQUISITES

Three conditions must be met by the veteran: (1) he must have satisfactorily served with the armed forces or merchant marine, (2) he must still be qualified to perform the duties of his previous position, and (3) he must make application for re-employment within ninety days if he served with the armed

⁹ 50 USC Appx, § 308(b)(B).

¹⁰ Kay v. General Cable Corp. (1944; CCA 3d) 144 F2d 653.

forces,¹¹ or within forty days, if he served with the merchant marine,¹² after the time he is relieved from service or from hospitalization continuing after discharge for a period of not more than one year.

Persons thus entitled to restoration to previous employment are entitled upon completion of service to a certificate with respect to satisfactory completion, if such is the fact, including a record of any special proficiency or merit attained, and in addition are entitled to a statement of medical record.¹³ Such statement is only furnished on the written request of the person concerned,¹⁴ and does not contain any reference to mental or other conditions which might prove injurious to his physical or mental health.¹⁵

The request for restoration to previous employment may be made personally. As a precautionary measure, it should be confirmed in writing, the veteran retaining a carbon copy for future reference. A request for indefinite leave of absence does not amount to a request for re-employment within the meaning of the statute.¹⁶

¹¹ 50 USC Appx, §§ 308(b), 357, 403(b).

¹² 50 USC Appx, § 1472(a).

¹³ 50 USC Appx, §§ 308(a), 357, 403(a).

¹⁴ 50 USC Appx, § 308.

¹⁵ 50 USC Appx, § 403(a).

¹⁶ *Grasso v. Crowhurst* (1945) 58 F Supp 857.

COMPELLING RE-EMPLOYMENT

If an employer refuses to re-employ a veteran, or fails to take favorable action within a reasonable time, the veteran or his counsel should seek the advice of the re-employment member of his local draft board, and if this fails to bring results, should consult with the United States District Attorney for the district where the employer has his place of business. Both officials are charged with the duty of giving the veteran assistance. If help is still not forthcoming, a letter to the Selective Training System, Washington, D. C., should solve the problem.

If there is merit in the veteran's claim to re-employment, it will be a rare case where he will find it necessary to go farther than to the United States District Attorney for help. If the District Attorney is satisfied that there is reasonable cause for the veteran to complain of his treatment by his former employer, it is his duty under the statute to appear and act as the veteran's attorney. The District Attorney will adjust the claim of the veteran amicably if he can, but if he cannot, then he will take such steps as may be necessary in the courts to compel the employer to comply with the provisions of the law.¹⁷

The United States District Court for the district in which the employer has his place of

¹⁷ 50 USC Appx, §§ 308(e), 1473.

business has power to force the employer to restore the veteran to his previous position and to compensate him for loss of wages or benefits because of the employers' failure to comply with the law. The proceeding to enforce restoration should be initiated by the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits. It is the duty of the court to order a speedy hearing and to advance the case upon the court calendar. No fees or court costs are taxed against the veteran applying for such benefits.¹⁸

Pending a determination in the District Court, the veteran should make a bona fide attempt to secure other work. This will be an imperative necessity in the case of veterans who would not otherwise have the means of livelihood. In any event, it will be a good thing to have started on a new job, for there is always the possibility that the District Court will decide that restoration to the old job cannot be enforced. Moreover, as a matter of law, it may be the duty of the veteran to mitigate the damages which he will suffer in loss of wages as a result of his former employer's refusal to re-employ him.

¹⁸ 50 USC Appx, §§ 308(e), 1473.

If the court decides that the veteran is entitled to be restored to his old position, it may also direct the employer to compensate such veteran for any loss of wages or benefits suffered by reason of the unlawful refusal to restore him to his former position. On the face of it, it would seem that the court has the power to require the employer to pay the veteran wages from the time the request for re-employment was made, or at least, so much of his wages as represents the difference between the amount the veteran has earned elsewhere in the meantime and the amount the employer would have paid him had he been promptly restored to his former position.¹⁹ In fact, it has been held that the District Courts have jurisdiction of an independent action for lost compensation covering the period between the time of making application for re-employment and the time of actual rehiring.²⁰

¹⁹ It should be noted that a District Court has held otherwise in one case, ruling that compensation runs only from the time of the commencement of an action in the District Court to compel re-employment. *Kay v. General Cable Corp.* (1945; DC) 59 F Supp 352.

²⁰ *Hall v. Union Light, Heat & P. Co.* (1944; DC) 53 F Supp 817.

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